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The Classic Arguments for Free Speech 1644-1927

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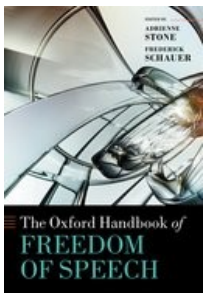

The Oxford Handbook of Freedom of Speech

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CHAPTER

2 The Classic Arguments for Free Speech 1644–1927

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Abstract

This chapter examines the classic arguments for freedom of speech. It traces the first comprehensive argument for freedom of speech as a limiting principle of government to John Milton's Areopagitica, a polemic against censorship by a requirement of prior licensing in which Milton develops an argument for the pursuit of truth through exposure to false and heretical ideas rather than the passive reception of orthodoxy. Despite Milton's belief in the advancement of understanding through free inquiry, he was far from liberal in the modern sense of that term and he did not, for instance, extend the tolerance he advocated to Catholic religious texts. The chapter then assesses what James Madison had to say about the role of public opinion as a crucial element in the creation of political authority and the preservation of rights, and considers Justice Oliver Wendell Holmes, Jr's opinions about the freedom of speech. It also looks at how the celebrated federal judge Learned Hand conceives of the freedom of speech as a majority-creating procedure rather than an individual right, while Justice Louis Brandeis understood the freedom of speech to be an individual liberty important as such but especially important for its contribution to democratic character. Ultimately, the most widely-read of the classic arguments for free speech is that developed by John Stuart Mill in his Essay On Liberty.

Keywords: freedom of speech, John Milton, Areopagitica, free inquiry, James Madison, public opinion, Oliver Wendell Holmes Jr, Learned Hand, Louis Brandeis, John Stuart Mill

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2.1 John Milton

As ideals, free thought and free speech have roots in accounts by the historians Herodotus and Thucydides explaining the distinctiveness of fifth-century Athens,[1] in the Socratic search for philosophic clarity and appreciation of the limits of understanding,[2] in Euripides' celebration of political participation[3] and Aristotle's recognition of the power of public opinion,[4] in the efforts of Renaissance humanists such as Petrarch and Erasmus to liberate moral reasoning from scholastic formalism,[5] in Machiavelli's counsels of prudential rule,[6] in notions of free conscience and inquisitive duty introduced by the Protestant Reformation,[7] and in the scientific method's systematization of open-ended ↳ knowledge seeking.
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However, for conceiving of the freedoms of speech and press as fundamental limiting principles of governance, the earliest argument that continues to be read today is John Milton's *Areopagitica* of 1644.[8] In that polemic, the great poet of *Paradise Lost* marshals a dizzying array of reasons and characterizations extolling bold individual inquiry and dynamic collective understanding.

Concerned about royalist propaganda and religious radicalism during the English Civil War, parliament instituted a requirement that all writings be approved before publication. This mimicking of the Crown censorship regime that had been in place for over a century-and-a-half distressed Milton, despite his otherwise strong support for the parliamentary side. He took up his pen and published a signed protest without getting approval, in proud defiance of the licensing requirement. He named it after an essay by an ancient Athenian critic of government.[9]

Milton's argument is audience-centred and deeply dependent on assumptions regarding the nature of religious belief and the responsibilities of citizens in a republic. Perhaps the most important idea he develops is that passive understanding in deference to custom or authority is a dereliction of duty. In this regard, heresy as conventionally understood to mean deviation from community orthodoxy, embracing ideas commonly thought to be false, is not a legitimate basis for regulation. Punishing heresy so conceived, he asserts, saps inquisitive energy, encourages shallow understanding, and presupposes a static 'possession' rather than an active, adaptive 'living' of truths. Milton's memorable phrase capturing this point is that one must not be a 'heretic in the truth', forming beliefs 'only because his pastor says so, or the Assembly so determines, without knowing other reason'.[10] That kind of passivity in citizens of a republic is irresponsible, Milton claims, and also contrary to scripture, where Truth is likened 'to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition'.[11]

Even though he was convinced that there are objective religious and political truths—Milton was no relativist, pluralist, or sceptic—he maintained that appreciating and living those truths requires 'scouting into the regions of sin and falsity'.[12] 'I cannot praise', he says, 'a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary'.[13] Anticipating a theme he would develop years later in *Paradise Lost*, he comments on the inseparability of good and evil after the Fall, leading to 'that doom which Adam fell into of knowing good and evil, that is of knowing good by evil'.[14] Part of the reason to expose oneself to falsehood and evil is to learn how to resist temptation. Throughout the tract, character development constitutes one of the chief benefits of enabling readers to confront unsettling ideas.

Proponents of licensing at the time were inclined to regulate speech in large part so as to preserve order
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towards the ends of military effectiveness in the Civil War and successful ↳ completion of the Reformation. Urgency called for regulation. But Milton argues that the apparent disorder that so troubled the would-be licensers of writing is actually part of the divine design for effectuating the Reformation. 'Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions, for opinion in good men is but knowledge in the making'.[15] Dynamism in understanding is God's will. 'We cannot pitch

our tent here', he tells his readers. A 'perpetual progression' of inquiry is the key to God's order, and also to the humanly constructed order of republican government.[16] Urgency requires freedom.

A modern reader is likely to find the *Areopagitica* deficient for its lack of detailed consideration of the harms that free speech can cause, even as Milton concedes at the outset that speech can 'spring up armed men'[17] and even as he briefly examines how evil ideas can cause 'infection', 'temptation', and 'distraction'.[18] But a probing examination of harm would be out of place in the tract. The essence of his case against licensing is not that false and evil ideas are inconsequential, but rather that the good that follows from letting audiences confront those ideas dwarfs the harm they cause. For he asserts that free inquiry is more than a good to be balanced against the costs it generates. For him, free inquiry is elemental. It is constitutive of Milton's twin causes of republicanism and Reformation. Both projects are utterly dependent on persons who are capable of thinking for themselves, and on an environment that encourages such thinking. Such persons and such an environment are not likely to flourish in a regime of comprehensive licensing, he warns.

Milton's prioritization of independent thought is the fulcrum of his argument. Without such a prioritization, the argument crumbles. The importance he attached to independent thought coheres with what he took to be a profound religious duty of highly personal inquiry. But even in his age and religious milieu, Milton's sense of what that duty entailed was exceptional. Few of his readers, then or now, could be expected to share it or to match the time and effort Milton devoted throughout his life to independent scriptural exegesis. That is why it is important to appreciate that his commitment to republican government also informed his prioritization of independent thought. At the outset, he specifies that his tract will address 'the discovery that might be yet further made both in religious and civil wisdom'.[19] In his lifetime, he was best known for having written the most widely-read polemics justifying the killing of a king (several were in Latin and read throughout Europe). When his side eventually lost out in the struggle over monarchy, Milton's high profile as the theorist of regicide made him a candidate for the scaffold. His republican credentials were central to his being.

His republicanism no less than his Protestantism may help to explain the feature of *Areopagitica* that most troubles modern readers: his refusal to extend the freedom for which he argues to would-be readers of Roman Catholic writings. If readers need to 'scout into the regions of sin and falsity' so as to know good by confronting evil, shouldn't they have access to the most sophisticated and widely-embraced alternative to
p. 23 Milton's ↳ religious world-view? So far as personal religious inquiry is concerned, the answer seems obvious. But when Milton says 'I mean not tolerated popery', his frame of reference is not that of an inquiring individual.[20] Catholicism, he complains, 'extirpates all religious and civil supremacies, so itself should be extirpate'.[21] His readers in 1644 could not have missed the intended allusion to the papal practice at the time of issuing formal interdicts instructing Catholics not to accept the authority of specified civil rulers. The most notorious of those interdicts during the early seventeenth century was issued in 1606 against the Venetian republic. The Catholic monk who sympathetically chronicled the Venetian resistance to that interdict, Fra Paolo Sarpi, became a celebrity among English republicans, much admired by Milton and cited with acclaim in *Areopagitica*.[22] Clearly, Milton considered the Catholic Counter-Reformation to be not simply an alternative theology but an existential threat to English republicanism.

Milton's republican and Protestant emphasis on character development and the collective energy of inquiry raises the question whether he has anything to say about methods of regulating speech that are less comprehensive and indiscriminately distrustful of writers and their audiences than is true of licensing. Criminal prosecution is selective and based on harms caused. So is the awarding of civil damages. Injunctions can be triggered by threats as well as past transgressions, but they too are selective. While in *Areopagitica* Milton, like a good lawyer,[23] argues the case at hand and leaves broader implications to be teased out by readers, his key claim that exposure to falsity helps audiences better to understand truth has purchase even against selective methods of regulating speech. All such methods, after all, are designed not only to punish and compensate but also to deter the speech that Milton believes has value despite its falsity

and capacity to harm. Depending on the magnitude of their deterrence effects, such regulatory methods fall within the scope of Milton's arguments.

Even though the reasons Milton advances for treating free printing as a transcendent good apply to all efforts to prevent or punish speech, two aspects of his case against licensing warrant emphasis in considering how much his analysis can contribute to the resolution of free speech disputes in the modern world, where the comprehensive licensing of speech is for the most part a thing of the past. First, he relies heavily on a futility argument. Books and pamphlets already in print cannot be recalled. Those of foreign origin are certain to be smuggled into the commonwealth. Unlicensed writings of local origin will circulate underground. The inevitable evasions 'will make us all both ridiculous and weary, and yet frustrate'.[24] Attempting to control the thought of a nation by the exercise of bureaucratic authority is like 'the exploit of that gallant man who thought to pound up the crows by shutting his park gate'.[25] Second, the power to
p. 24 license will be exercised to settle scores, cut corners, and curry favour. Persons capable of ↳ judging writings in a discerning, fair-minded manner will not be drawn to the assignment. His futility and corruption arguments invoke hard-headed practicality, as befits an admirer of Machiavelli. The futility and corruption calculus needs to be specific to each method of regulation. It seems likely that licensing is particularly prone to futility and corruption. Nevertheless, Milton's point can be read to be more fundamental: whatever the method chosen, in practice if not necessarily in theory, the quest for a disciplined, disinterested, measured, rational system for controlling ideas is chimerical. The centre cannot hold.

Reading Milton with an eye to his usefulness 375 years later is an inquiry he would have welcomed. He would be nobody's favourite in a humility contest; he saw himself as writing for the ages. Even as he tried to influence the parliament of 1644, he built his argument on the claims of posterity. He has succeeded better with posterity than he did with the parliament. The Licensing Order was not repealed. When the Stuart monarchy was restored in 1660, the licensing of books and pamphlets was ratcheted up with a vengeance. However, by the fiftieth anniversary of the *Areopagitica*, in the wake of the Glorious Revolution of 1689, comprehensive licensing was abolished in England, never to be reinstated. At the time of the passage of the First Amendment, there was much uncertainty and indeterminacy about its coverage and strength of protection, but all parties agreed that its minimal meaning was that the comprehensive licensing of pamphlets, newspapers, and books was categorically disallowed.

Milton's delayed impact is fitting. His judgment about the transcendent benefits of free thought and writing derived in no small measure from his belief that many of those benefits would be realized by future generations. As he put it in *Areopagitica*: 'a good book is the precious lifeblood of a master spirit, embalmed and treasured up on purpose for a life beyond life'.[26] Whether he would have said the same about a good pamphlet is not clear, but there can be no doubt that Milton's singular polemic against licensing has outlived him.

2.2 James Madison

The strangest phenomenon in the sociology of knowledge about the freedom of speech is that there exists a subtle, profound, extended essay on the subject by the principal author of the First Amendment which has attracted very few efforts at systematic interpretation and critique. This is all the more surprising because the author, James Madison, many of whose other reflections on the requisites of enduring republican government are widely studied and debated, had much to say about the role of public opinion as a crucial element in the creation of political authority and the preservation of rights. Currently, Madison scholarship
p. 25 is experiencing a major breakthrough in ↳ resurrecting his emphasis on public opinion, but that excellent work for the most part has not focused on what Madison wrote about the First Amendment.[27]

Madison's occasion for addressing in print the meaning of the First Amendment was the passage of the Sedition Act of 1798. Undoubtedly motivated by a desire to intimidate and incapacitate newspapers expected to support Thomas Jefferson in the presidential election two years hence, that statute made it a crime to publish any 'false, scandalous, and malicious writing' against 'the government of the United States, or the President of the United States, or either house of the Congress'. (At the time, Jefferson was Vice-President; it was no accident that the law omitted making it a crime to criticize the occupant of that office.) The statute specified that the requisite malice could be established by a finding that the defendant intended 'to excite' against the object of his criticism the 'hatred of the good people of the United States' or 'to stir up sedition'. In application, the falsity requirement routinely was found to be satisfied by determining that the defendant's opinionated characterizations and conjectures were unfounded; getting hard facts wrong was not a precondition for conviction. (Representative Matthew Lyon of Vermont, for example, was convicted and sentenced to four months in prison for writing that John Adams was engaged in 'a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice'.[28]) Madison collaborated with Jefferson to draft resolutions challenging the constitutionality of the law, which were then passed by the Virginia and Kentucky legislatures and sent to the legislatures of all the other states. The disappointing response to those resolutions prompted Madison to write a lengthy, anonymous *Report on the Virginia Resolutions*, spelling out why the Sedition Act was unconstitutional. Part of that *Report* is a detailed account of how the Act violates the First Amendment. In the intervening eight years since its ratification, no one had published such a thorough and probing analysis of the Amendment.

Madison begins by discussing the inapplicability of the English common law regarding freedom of the press, the different theories of sovereignty in England and the United States, the traditions of criticism of public officials in the two countries, and the concerns that prompted the decision to amend the Constitution by adding the Bill of Rights. Then he announces that his acute, informative observations regarding these matters serve merely as a prologue to his controlling line of argument:

> But the question does not turn either on the wisdom of the Constitution or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument.[29]

p. 26 In this way, Madison presents as what we now call a 'textualist'. Read the document to discover meaning. However, his reading of the document marks him as a special kind of textualist. For he reads the First Amendment not in isolation but rather as an integral part of the Constitution viewed as a (textual) whole. This should not be surprising because when Madison first introduced to the House of Representatives his proposed amendments relating to religious liberty, freedom of the press, trial by jury and other rights, he urged that they be integrated into the pre-existing sections of the Constitution.

To his mind, the key to finding the 'actual meaning' of the First Amendment, or any other part of the Constitution, was to understand the structures and relationships, the assumptions and the functions, that are discernible from reading the text of the Constitution as an integrated whole establishing a republican form of government based on the principle of popular sovereignty. Textual enactment rather than philosophic wisdom or political intention must determine interpretation, but what is enacted is the full text, not its elements in isolation.

One feature of his comprehensive textualism is how he formulates the rights he takes to be violated by the Sedition Act of 1798. Madison discusses at length in the *Virginia Report* not only 'the freedom of the press' but also the 'right of freely examining public characters and measures', the right 'of free communication among the people' concerning public characters and measures, and the 'right of electing the members of the government'. The last three do not appear in the First Amendment or anywhere else in the Constitution as denominated rights as such, but Madison finds them to be enacted by the structure of accountability specified by the constitutional text. Interestingly, he does not discuss 'the freedom of speech' as a general right not limited to communication concerning public characters and measures.

He describes the rights-generating structure of accountability as follows:

1. The Constitution supposes that the President, the Congress, and each of its Houses, may not discharge their trusts … Hence all are made responsible to their constituents, at the returning periods of elections …

2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper, that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

3. Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or a hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

4. Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the government, it is the duty, as well as the right, of intelligent and faithful citizens
p. 27 to discuss and promulgate ↳ them freely—as well as to control them by the censorship of the public opinion, as to promote a remedy according the rules of the Constitution.[30]

Madison then argues that this structure of accountability informed by government and citizen duties is undermined when officials seeking re-election are immunized by law from public scrutiny and criticism more than are their challengers:

> … [T]he right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.[31]

The Sedition Act of 1798, he maintains convincingly, was designed to achieve an electoral asymmetry advantageous to incumbents so far as exposure to critical scrutiny is concerned.

Following Locke and many other seventeenth- and eighteenth-century writers whose works he devoured, Madison believed in natural rights. Like Locke, he thought that individuals unable to protect their rights in the state of nature join together in civil society for the purpose of collectively safeguarding their rights, and to this end create governments that take the form of constitutional regimes. The civil society stage of this process—the instituting of regimes and, when they fail, the withdrawal of authority from them, typically by revolution—is central to notions of limited government, justifiable revolution, and the authority of public opinion which were the driving ideas of Madison's political life.[32] When he speaks of such rights as freedom of the press and the right of freely examining public characters and measures, he cannot be saying they are natural rights in the sense of entitlements in the state of nature bestowed by the Creator and capable of being exercised while leaving 'to everyone else the like advantage'.[33] But neither can he be saying they are merely the creation of a particular constitutional regime. Such rights are for him fundamental—'secured' by the Constitution rather than brought into existence by it—because they enable the people in civil society to do their work of creating and withdrawing political authority. Madison scholar Gary Rosen labels these rights incident to civil society 'intermediate rights'.[34] I prefer the term 'constituting rights'. Whatever they are called, they play a large role in Madison's thought.

p. 28 Madison believed that freedom of the press and the right of freely examining public characters and measures are constituting rights integral to a system of accountability that reaches back all the way to civil society itself. And because of the accountability of all regimes to civil society, he insisted on reading the

Constitution in structural and functional terms, as a servant of civil society so to speak, beholden to a higher authority and properly to be interpreted with reference to how that higher authority, 'the people', is best served by the constitutional regime. This method of interpretation was on display three years after ratification of the First Amendment when Madison spoke in the House of Representatives in opposition to a proposed resolution condemning certain political societies whose anti-government polemics were thought to have encouraged a violent tax rebellion. Rather than invoke a freestanding right of freedom of speech, he said: '[i]f we advert to the nature of republican government, we shall find that the censorial power is in the people over the government, and not in the government over the people'.[35] Notably, this statement was quoted by the Supreme Court in its landmark opinion in *New York Times v Sullivan*, which decreed the rejection of seditious libel to be 'the central meaning of the First Amendment'.[36]

True to his comprehensive approach to understanding rights and powers, when Madison introduced his draft for a bill of rights, he urged (unsuccessfully) that the Constitution be amended to affirm

> That all power is originally vested in and consequently derived from the people ... That the people have an indubitable, unalienable, and indefeasible right to reform and change their government whenever it be found adverse or inadequate to the purposes of its institution.[37]

The 'freedom of the press', the 'remedial right' of 'electing the members of the government' with 'equal freedom' to scrutinize the candidates, and the 'right of freely examining public characters and measures, and of free communication among the people thereon', Madison viewed as all derivative from the yet more fundamental right of people in civil society 'to reform and change their government'.[38] He was not only the father of a constitution but also the child of a revolution.

2.3 John Stuart Mill

Almost certainly the most widely-read of the classic arguments for free speech is that developed by John Stuart Mill in his *Essay On Liberty*, first published in 1859 and never out-of-print since then.[39] In the second
p. 29 chapter, entitled 'Of the Liberty of Thought and ↳ Discussion', Mill examines the value of free thought and discussion under three different assumptions: (1) that the received opinions which are being challenged by the speech at issue are false; (2) that the received opinions are true; and (3) that 'the conflicting doctrines, instead of one being true and the other false, share the truth between them; and the non-conforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part'.[40] He offers powerful reasons why unregulated thought and discussion is of great value under each of the three assumptions.

So far as the possible falsity of received opinion is concerned, his argument turns on human fallibility. History is replete with instances of ideas that were held to be true by almost everyone, including the wisest persons of the place and time, but which no serious person now thinks are correct. Mill goes so far as to say that:

> the source of everything respectable in man, either as an intellectual or a moral being, [is that] his errors are corrigible. He is capable of rectifying his mistakes by discussion and experience.[41]

Because fallibility is endemic at every level of society, '[c]omplete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of acting'.[42]

When a received opinion is in fact true (his second assumption), there is great value in permitting it to be challenged so that it will be held as a 'living truth' rather than a 'dead dogma'.[43] Persons in possession of true opinions must know the best that can be said against those opinions. Ideally, the objections must be

confronted 'in their most plausible and persuasive form' as developed by 'persons who actually believe them'.[44] Without such exposure to forceful challenge, believers will fail to achieve a 'lively apprehension of the truth', an understanding that 'may penetrate the feelings and acquire a real mastery over the conduct'.[45] For 'both teachers and learners go to sleep at their post as soon as there is no enemy in the field'.[46]

Mill's third assumption, 'when the conflicting doctrines ... share the truth between them', he takes to be the most common situation. For the 'standing antagonisms of practical life', such as those between order and progress, co-operation and competition, sociality and individuality, or liberty and discipline, 'it is in great measure the opposition of the other that keeps each within the limits of reason and sanity'.[47]

Like Milton before him, Mill's argument is audience-centred, devoted to the enhancement of collective understanding over time, and much concerned with the deadening effect of persons uncritically following custom in forming their beliefs. Like Milton, Mill argues that how persons hold their beliefs—actively, independently, and by engaging opposing ideas rather than passively—is very important to developing the
p. 30 individual character of members of the community. Like Milton, Mill seeks an energetic environment ↳ of inquiry and debate within which individual beliefs are formed. Like Milton, Mill singles out paternalism for special contempt. However, unlike Milton, Mill accords no role to divine providence in ensuring the eventual triumph of truth over falsity and good over evil. Rather, he maintains that the 'real advantage which truth has' is that it can be rediscovered when circumstances are favourable to its acceptance.[48] Unlike Milton, Mill regards informal social punishment of persons with unpopular beliefs to be a greater threat to collective progress in understanding than is posed by the exercise of governmental power to censor. This focus on private punishment of dissenters may be Mill's most distinctive contribution.

Chapter two of *On Liberty* is preceded by a chapter in which Mill introduces his famous Harm Principle: 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.[49] Later in the Essay he specifies that although harm to others is a necessary condition for limiting liberty it is not always a sufficient condition. That depends on whether the harm outweighs the benefit. Chapter two is succeeded by a chapter entitled 'On Individuality, As One of the Elements of Well-Being', in which Mill sketches a character ideal of the strong-minded, engaged, fearless, independent person who serves society by contributing to the creation of a diverse, energetic environment and abundant opportunities for various experiments in living. One of the great challenges in reading *On Liberty* is to figure out how, if at all, chapters one, two, and three hang together.

So far as speech is concerned, it is not hard to appreciate how Mill's character ideal in chapter three might serve the truth-seeking project that is the subject of chapter two. Inquisitive, assertive, courageous, resilient individuals are needed to generate the clash of opinions, including novel opinions, upon which progress in understanding depends. Such persons also are best able to stand up to the social pressures that Mill identifies as the greatest threat to independent thinking.

But how does Mill's Harm Principle of chapter one fit with his argument in chapter two regarding the transcendent social value of free thought and discussion? What should we make of the fact that in chapter two Mill never once discusses the harm that might follow from thought and discussion? The entire chapter is devoted to exploring only the benefits of those two activities. Moreover, at the end of chapter one, right after he introduces his Harm Principle, Mill says that the 'appropriate region of human liberty' comprises 'absolute freedom of opinion and sentiment on all subjects' as well as a comparable 'liberty of expressing and publishing opinions'.[50] This 'absolute' freedom, he specifies, does not govern the 'liberty of tastes and pursuits' or the liberty of 'combination among individuals', both of which liberties are bounded by the qualification 'so long as what we do does not harm [others]'.[51] No such qualification is appended to the 'liberty of expressing and publishing opinions'. Is the liberty of thought and discussion (including both
p. 31 freedom of opinion and sentiment and the liberty of expressing and ↳ publishing opinions) different from the other liberties in being exempt from the Harm Principle? If so, why?

At the beginning of chapter three, the chapter about 'individuality', Mill offers an example—really two examples—which help to explain how his Harm Principle relates to his detailed account in chapter two of the various ways that an unqualified liberty of thought and discussion contributes to progress in understanding. He posits two instances of criticism of corn-dealers, whose practices affecting the price of bread were the subject in Mill's day of intense public controversy. One critic expresses the opinion that 'corn dealers are starvers of the poor' to 'an excited mob assembled before the house of a corn dealer'. The other critic publishes the identical opinion 'simply circulated through the press'.[52] Mill states that the speech of the critic addressing the excited mob can be punished but that the critic publishing his harsh opinion of corn-dealers in the press cannot. Why the difference? He does not invoke the differential probability of harm in the two situations, for he never examines how probable is the harm that might follow from publishing the harsh opinion in the press. Instead, Mill says that the on-site critic speaking to the assembled mob is engaging in a 'positive instigation to some mischievous act', something he does not say about the critic speaking through the press.[53] Is the way he differentiates these two examples, protecting one critic and not the other when both are saying the same thing, consistent with Mill's earlier embrace of the 'absolute' liberty of 'expressing and publishing opinions'? Are the examples consistent with his analysis in chapter two regarding the overriding value of the liberty of thought and discussion? Is the different treatment of the two examples consistent with his Harm Principle?

Mill says in chapter one of *On Liberty* 'I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being'.[54] All utilitarians, even 'progressive' utilitarians, are committed to comparing the pleasure and pain generated by the acts and activities they are evaluating. By definition, they count the costs. Thus, harm matters. Always. So why not for the harsh critic of corn-dealers publishing his opinion in the press? How can the freedom to express an opinion 'on all subjects' possibly be 'absolute' for a utilitarian committed to counting the cost? The answer to this question lies, I believe, in the distinction, long familiar to students of utilitarian ethics, between 'rule utilitarianism' and 'act utilitarianism'.[55]

The unit of reference for comparing the benefits and costs of communicative acts is not a given. The unit of reference can be a discrete act viewed in isolation. Or it can be a congeries of discrete acts that are similar enough to be considered together and evaluated categorically as an 'activity'. The unit of reference inevitably affects, indeed it can determine, how the balance of benefit and cost comes out. In chapter two, Mill fails to discuss the harms that can follow from particular instances of thought and discussion because
p. 32 he maintains that the general category he denominates 'thought and discussion' on balance ↳ generates more good than harm. Because of that categorical judgment, each particular instance of thought and discussion is not evaluated in terms of either benefit or harm but rather receives 'absolute' protection. A thinker like Mill, who places so much emphasis on progress through knowledge and reflection on experience, might stand ready to make such a categorical judgment of net utility. A thinker like Mill, who perceives individual character to be the most vital source of progress, might think that, when considered categorically, thought and discussion is so integral to character building that no amount of harm flowing from discussion can outweigh that elemental benefit.[56]

But that kind of categorical rule-utilitarian conclusion is defensible only if the operative category 'thought and discussion' is carefully delineated. The claim that the benefits outweigh the harms categorically would be implausible if the category were defined expansively to include uses of words or images that make no claim to enhance understanding by means of appealing to the judgment and sensibilities of members of the audience. Words and images serve various functions, not all of which entail or implicate 'thought' and 'discussion' as Mill employs those terms. It is no accident that all the arguments he summons in chapter two are about truth-seeking rather than self-expression, incitement, intimidation, bonding, or transmitting information for purposes other than advancing public knowledge.

In that regard, 'positive instigation to some mischievous act' is simply not 'thought and discussion'. To engage in such instigation is to exercise one's liberty, but it is not to engage in an activity about which we can say that the good categorically outweighs the harm. As such, the speech can be regulated when in the circumstances its probable harm outweighs its probable good. Particularistic act-utilitarian evaluation is needed.[57] Not so for the critic offering a harsh general opinion about corn-dealers via the press. That is chapter two 'thought and discussion' covered by Mill's categorical rule-utilitarian balancing judgment finding net utility in the overall activity. The Harm Principle is still applied, but at a higher level of generality than is appropriate for evaluating instances of positive instigation.

Many questions remain, even if this analysis explains why Mill does not discuss harm in chapter two and why he selectively ignores his Harm Principle when denominating at the end of chapter one the various liberties he is about to examine. We need to know Mill's criteria for differentiating thought and discussion from other endeavours involving words and images. We need to know how he computes the act-utilitarian benefits and harms that are generated by communications that do not qualify as thought and discussion. We need to know whether a regulation that is 'partial' in the sense of restricting the time, the manner, or the place of the discussion while leaving open ample alternative means to carry on the inquiry amounts to a
p. 33 violation of the 'absolute protection' ↳ for thought and discussion that Mill finds requisite. More fundamentally, we need to know whether we should accept at face value Mill's claim that he really is defending the liberty of thought and discussion on utilitarian grounds rather than, as several of his most sophisticated and admiring interpreters maintain, on the basis of what amounts to an autonomy argument.[58]

There are loose ends and unanswered questions aplenty in *On Liberty* but also much that is memorable. Mill's ambition in seeking to understand the freedom of thought and discussion in the context of the full range of liberties that might warrant special protection amounts to a lasting contribution in its own right. Important components of his legacy include his unrelenting emphasis on personal character as an engine of social progress and his recognition of the threat posed to individuality by informal private punishment. Perhaps Isaiah Berlin best captured the Essay's impact:

> [M]ost of his arguments can be turned against him; certainly none is conclusive, or such as would convince a determined or unsympathetic opponent … Nevertheless, the inner citadel—the central thesis—has stood the test. It may need elaboration or qualification, but it is still the clearest, most candid, persuasive, and moving exposition of the point of view of those who desire an open and tolerant society. The reason for this is not merely the honesty of Mill's mind, or the moral and intellectual charm of his prose, but the fact that he is saying something true and important about some of the most fundamental characteristics and aspirations of human beings …

> He was the teacher of a generation, of a nation, but still no more than a teacher. … He was not original, yet he transformed the structure of the human knowledge of his age.[59]

If history is a guide, Mill's compelling exploration will continue to fascinate, frustrate, and inspire students of the freedom of speech for generations to come.

2.4 Learned Hand

In the earliest judicial opinion on the subject that continues to be studied in law schools and discussed in the academic literature, the celebrated federal judge Learned Hand conceives of the freedom of speech as a majority-creating procedure rather than an individual right. He maintains that collective self-criticism is the essential precondition that gives the phenomenon of consent of the governed its authority to coerce
p. 34 compliance. ↳ Hand's premise is that only laws passed and public opinion generated in the face of what he terms 'hostile criticism' can claim to embody the will of a governing majority.

In *Masses Publishing Company v Patten*,[60] one of the first judicial interpretations of the Espionage Act of 1917, he read the statute to prohibit only a statement that tells a person 'it is his interest or his duty' to violate the law. Political advocacy, however critical and intemperate, that falls short of invoking a duty or interest to break the law is 'part of that public opinion which is the final source of government in a democratic state'.[61] In Hand's understanding of 'the normal assumption of democratic government', the 'suppression of hostile criticism does not turn upon the justice of its substance or the decency or propriety of its temper'.[62] Neither does it turn on the predicted consequences of the speech. The anti-war advocacy under review in the *Masses* case involved sharp accusations that World War I was being fought to serve the class interests of economic elites. The issue of the magazine in dispute included admiring portraits of draft resisters. Hand characterized such speech as of a sort that might 'enervate public feeling at home', 'encourage the success of the enemies of the United States abroad', and 'promote a mutinous and insubordinate temper among the troops'.[63] However, because the speech amounted to political agitation rather than 'direct incitement to violent resistance', it qualified as hostile criticism that serves the democratic function of forging majority will.[64]

In a later opinion and in letters to Justice Oliver Wendell Holmes and the Harvard law professor Zechariah Chafee, Hand elaborated on his proposed legal test.[65] He reiterated his statement in *Masses* that he would make controlling not the literal meaning of the words used by the speaker but the message conveyed. He said that Mark Anthony would not escape punishment by his demagogic technique of literally admonishing against rioting to avenge Caesar's murder while unmistakably conveying the opposite message to his plebeian listeners.

In his subsequent explanations of his *Masses* opinion, Hand gave two reasons why legal liability should be a function of the meaning conveyed by the speaker's words rather than either the predicted consequences of the speech or the speaker's illicit intent. First, the meaning conveyed by the speech is what matters most in determining whether it contributes to the hostile criticism that serves the process of constituting a legitimate governing majority. In this view, it is the value of the speech that is the most important variable in deciding whether it is protected. Second, a test that turns on what the speaker actually said rather than what he risked causing or intended can take the form of 'a qualitative formula, hard, conventional, difficult to evade'. A legal standard of that type, Hand surmised, 'might be made to serve just a little to withhold the
p. 35 torrents of passion to which I suspect democracies will be found more subject than for example the whig ↳ autocracy of the 18th century'.[66] 'I think it is precisely at those times', he wrote Chafee, 'when alone the freedom of speech becomes important as an institution'.[67]

The two reasons are interrelated in that if the project is to secure a minimum of speech without which legitimate authority cannot be constituted, there is much to be said for a doctrinal safe harbour protecting the requisite speech unqualifiedly. A test that turns on predicted consequences or speaker intent is not well suited to providing such a safe harbour. Those phenomena are difficult to observe, measure, and prove. To identify them, a factfinder ordinarily must rely on speculation, inference, extrapolation, and generalization. What meaning a particular writing or speech conveys to its audience will not always be self-evident—interpretation and judgment cannot be eliminated from the process of applying a speech-protective

standard—but the space for erratic or prejudicial assessment is smaller when the operative phenomenon is the actual meaning conveyed by a particular statement rather than its predicted consequences or the speaker's intent.

Hand's preference for a qualitative distinction between protected and unprotected speech was not driven solely by these practical concerns about the efficacy of a safe harbour and the risk of inconsistent, biased application. He considered the distinction between the direct advocacy of law violation and speech falling short of such advocacy to be fundamental as a matter of democratic theory, as this passage in a letter to Zechariah Chafee makes clear:

> [A]ny State which professes to be controlled by public opinion cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expression of opinion as tolerable, if not good. As soon as it does not, it inevitably assumes that one opinion may control in spite of what might become an opposite opinion.[68]

The commitment not to become 'a State based upon some opinion, as against any opinion which may get itself accepted' Hand considered to be 'indubitably the presupposition of democratic states, however little they have lived up to it'.[69] In this respect, adherence to the principle of majority rule is a dynamic process, evincing a concern about inchoate, incipient, and potential majorities no less than current ones.

For Hand, both the justification for protecting controversial speech and the limits to that protection depend on categorical judgments regarding which kinds of speech as a general matter serve the democratic function of creating a governing majority. But Hand was no formalist. He recognized that words and images are deployed to serve a multiplicity of functions, many of which have nothing to do with contributing to the hostile criticism that enables and legitimates majority rule. Speech serving such extraneous functions he
p. 36 considered not to fall within the domain of the freedom of speech. ↳ One characteristically trenchant sentence making this point in his *Masses* opinion reveals how central it was to his analysis:

> Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.[70]

Hand derived his preferred limit to the freedom of speech from the same source from which he derived his justification for that freedom: the requisites of majority rule. In a letter to Eliot Richardson, written more than thirty years after he wrote the *Masses* opinion, Hand defended his refusal to ascribe democratic value to speech that counsels law violation:

> My reasons may sound didactic and too generalized; but here they are. Every society which promulgates a law means that it shall be obeyed until it is changed, and any society which lays down means by which its laws can be changed makes those means exclusive ... If so, how in God's name can an incitement to do what will be unlawful if done, be itself lawful? How do words differ from any other way of bringing about an event?[71]

Majorities must be forged and sustained by surviving hostile criticism, and so must their laws, but the authority thereby created is brought into existence in order to govern, if necessary by deploying the resources of the state to enforce compliance. This is the other side of the coin of democratic function.

Those who understand the freedom of speech in these terms might reasonably disagree about which types of dissenting speech are fundamentally inconsistent with recognition of the authority of majority will, and in that respect not part of the very process that makes that freedom essential. At one extreme, some might conclude that the act of flag burning so diminishes the principal symbol of sovereignty as to compromise

majority rule. At the other extreme, some might think that only the explicit and specific counselling of violence, perhaps only violence already planned in some detail and designed to be employed on a large scale, sufficiently contradicts majority rule as to fall outside the project of generating political authority by means of hostile criticism. The advocacy of non-violent civil disobedience to be undertaken openly, with willing submission to punishment, for the purpose of reforming the law—Dr Martin Luther King's definition of the concept[72]—might readily be considered part of the process of identifying majority will, particularly in the context of massive denial of the right to vote.

p. 37 There is nothing inevitable about where Hand drew the line. What is most significant about his analysis in the *Masses* case are the considerations he took to be relevant in determining the boundary between protected and unprotected speech, considerations that derive from the notion of freedom of speech as a majoritarian procedure.

2.5 Oliver Wendell Holmes, Jr.

The prominence of Justice Oliver Wendell Holmes, Jr in the history of American legal thought derives in no small measure from his characteristically terse but eloquent opinions about the freedom of speech. The irony is that it took the quick-witted Holmes seventy-eight years to overcome his instinctive rights scepticism and appreciate how robust constitutional protection for dissenting speakers can be justified.

His starting point was a proudly deflationary understanding of truth and rights. He liked to define 'truth' as 'the majority vote of that nation that could lick all others'.[73] A 'right' Holmes considered nothing more than a 'prophecy ... that the public force will be brought to bear on those who do things said to contravene it'.[74] What justifies rights is 'the fighting will of the subject to maintain them ... A dog will fight for his bone'.[75] Energy and force are what interested him, not rationality, process, or human dignity.

Some students of Holmes believe that his harrowing experience as a Civil War soldier left him preoccupied with forces beyond individual control.[76] He was wounded three times, twice nearly mortally. During triage on the battlefield at Antietam, the first attending surgeon classified Holmes among the badly wounded not worth trying to save, but a medic demurred and had him moved to a farmhouse for treatment.[77] His less serious third wound, a heel injury suffered near Fredericksburg, probably saved his life. It required a few months' convalescence back in Boston. This prevented Captain Holmes from joining his regiment at the Battle of Gettysburg, where on the third day the Twentieth Massachusetts was stationed on Cemetery Ridge at the very apex of Pickett's Charge. That day, two-thirds of the officer corps of the Twentieth died.[78]

Not surprisingly, given this background, during his twenty years as a state Supreme Court justice in Massachusetts and for his first fifteen years on the Supreme Court, Holmes consistently ruled against free
p. 38 speech claims.[79] This pattern persisted into the ↳ spring of 1919 in cases involving prosecutions of various speakers for statements critical of US participation in World War I and the accompanying draft.[80]

Then, in November of 1919, Holmes unexpectedly dissented from a decision upholding convictions of five Russian immigrants under the Espionage Act of 1918 for distributing pamphlets criticizing President Wilson's dispatch of US troops to Russia to aid forces fighting against the Bolsheviks.[81] When circulated, his proposed dissenting opinion so disturbed his colleagues in the majority that a delegation of them visited his home to implore him not to publish it.[82] Happily for posterity, the old soldier held his ground and resisted their entreaties. And so the most quoted paragraph ever written about the freedom of speech entered the US Reports.

Holmes begins that paragraph, the peroration of his dissent in *Abrams v United States*, by conceding the rational logic of persecution:

> If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.[83]

Then, true to his observation forty years earlier in his book *The Common Law*[84] that 'the life of the law has not been logic; it has been experience', Holmes shifts gears:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[85]

By framing the issue in terms of how best 'safely' to achieve the 'ultimate good desired', Holmes finds his answer in the dynamic character of human understanding, a premise not only of the common law but also, in his view, of the constitutional regime. Far from being a repository of enduring principles, even the Constitution itself

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> is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.[86]

If epistemic humility and adaptability sustained by the continuous competition of ideas is 'the only ground' upon which the people's 'wishes safely can be carried out', the freedom of speech takes on a special significance that sets it apart from other claims of right:

> While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[87]

This distinctive significance had escaped Holmes's notice in his earlier free speech opinions. The change of attitude was not fleeting. As Holmes would put the matter in another memorable dissent ten years later:

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.[88]

Why exactly did Holmes believe that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'?[89] The place to start in trying to answer this question, I submit, is Holmes's oft-proclaimed interest in the work of Charles Darwin. *The Origin of Species* came out when he was a Harvard undergraduate. It had an electrifying effect on the campus, and Holmes was in the middle of that. Later, when he returned home from the Civil War, Holmes joined a high-powered discussion group—other participants included William James and Charles Sanders Peirce—which self-mockingly called itself The Metaphysical Club. Its leader, Chauncey Wright, a thinker Holmes admired, corresponded with and visited Darwin, who considered Wright's command of evolutionary theory to be remarkable. Scientific method was frequently discussed by the group.[90]

Someone who brings a Darwinian perspective to the topic of market ordering is likely to be impressed by the way markets force adaptation to changing conditions. This includes attitudinal adaptation, which can be

encouraged by having a plethora of points of view on offer. Adaptation also involves weeding out the
p. 40 fallacious and the obsolete. Holmes once explained his late-arriving regard for the freedom of speech in terms of ↳ such weeding out: 'in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat'.[91] Adaptation frequently demands the redirection of inquisitive energy, a corrective that can be stimulated by competition over ideas. Ordinarily, adaptation requires persons to overcome the forces of custom and inertia. By the way it can excite the passions and energize the will, sometimes even by the anger it generates, free speech can serve as a countervailing force. As with natural selection in biological evolution, adaptive change in the realm of ideas occurs mostly in populations rather than individuals, as demographic developments, most significantly generational turnover, change the mix and new arrivals with different priorities deriving from different experiences exert influence enabled by the relative openness of market ordering.

So far as the freedom of speech is concerned, Holmes is best known for three formulations: (1) his clear-and-present danger test; (2) his limiting example of falsely shouting 'Fire!' in a theatre and causing a panic; and (3) the marketplace-of-ideas metaphor. Each formulation—the proposed doctrinal standard, the limit case, the suggestive metaphor—is about the role that time plays in human events. When exercising his rare gift for minting aphorisms, Holmes repeatedly spoke about time: 'time has upset many fighting faiths';[92] 'property, friendship, and truth have a common root in time';[93] 'leave the correction of evil counsels to time'.[94] The point of his book *The Common Law* is that legal doctrine is all about evolution and adaptation.

Holmes came to value the freedom of speech largely for its capacity over time to generate new ways of thinking, discredit obsolete ideas, and alter priorities of inquiry. Those long-term consequences are what he had in mind when he pronounced the competition of the market to be the best test of truth. Characteristically, he saw the freedom of speech not as a source of individual understanding, assertion, or identity but rather a force—a force for collective adaptation.

2.6 Louis Brandeis

Justice Louis Brandeis understood the freedom of speech to be an individual liberty important as such but especially important for its contribution to democratic character.

Brandeis's concurring opinion in *Whitney v California* [95] decided in 1927, contains his most intellectually ambitious account of the freedom of speech. The four-paragraph segment of the opinion in which Brandeis spells out his general philosophy regarding free speech begins with a cascade of assertions regarding the
p. 41 beliefs of 'those who won our independence', beliefs that have a suspicious congruence with those we know ↳ Brandeis held. Right away, a complex, interactive relationship between individual liberty and collective well-being is suggested:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.[96]

It may help in trying to interpret Brandeis to know that his observation about liberty being the secret of happiness and courage the secret of liberty was lifted from the Funeral Oration of Pericles, as rendered by Thucydides in his *History of the Peloponnesian War*.[97] Pericles attributed Athens' military success to the courage, awareness, and inventiveness that Athenians possessed as a result of their stimulating culture, which offered many opportunities for personal initiative and civic responsibility. His basic point was that individual, civic, and military flourishing are interconnected.[98]

In this regard, it is also noteworthy that throughout his *Whitney* opinion Brandeis seems unable to mention liberty without instantly invoking what it leads to: deliberative forces prevailing over arbitrary forces, happiness, the discovery and spread of political truth. The list grows as the paragraph progresses:

> [Those who won our independence] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.[99]

Order, stable government, the path of safety, the fitting remedy, non-arbitrary resolution of differences—this is a catalogue of the most important goods that governments are instituted to provide, and they all flow from the freedom of speech, according to Brandeis.

Not only individual rights but also civic duties are part of this complex web of relationships:

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> Those who won our independence believed ... [t]hat the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[100]

Brandeis viewed the freedom of speech as generated in significant part by duties. Rights and goods that others think of as protecting individual choice or personal space—privacy, economic security, entrepreneurial opportunity, leisure time—Brandeis prioritized for their contribution to the discharge of the duties of citizenship. For him freedom was serious business.

Further evidence of this seriousness can be gleaned from the paragraphs that follow Brandeis's account of 'the final end of the state'. They are mostly about civic character, something that was much discussed in ancient Athens and Rome, as well as during the American founding, less so in Brandeis's time or today. In uncharacteristically soaring prose, first he proclaims:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.[101]

Then he comments on the character of the founding generation:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.[102]

Next, he explains how the clear-and-present-danger test that he and Holmes had earlier embraced is best understood not as a standard marking the threshold of rational regulatory prediction of harm but rather the point when strong character cannot save the situation for lack of time:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[103]

In short, the freedom of speech is a remedy as much as a right, or rather a right that can best be justified and demarcated by appreciating its role in preserving civic order, identity, and aspiration:

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> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not ↳ enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[104]

The key to understanding Brandeis, I think, is to realize that when he uses the term 'reconciled' in this passage he means 'integrated into' rather than 'traded off against'. Like the ancient Greeks and the American Founders, he believed that government based on popular sovereignty depends most of all on the character of its people. Character is a public good, arguably the most precious. Not only does civic courage—the courage of the citizenry to confront unwelcome challenges, the courage to sustain commitment in the face of difficulty or disappointment—constitute the strongest check against evil ideas, it provides the energy of reform and aspiration. For all its dangers and excesses, free discussion is an indispensable ingredient of civic courage.

Brandeis insisted that the liberties deserving of special constitutional recognition are not threats to political and public order but rather *components* of such order. He came to that insistence not only by learning what he could from ancient and modern history, but also, and much more importantly, by spending most of his life tirelessly contending with various forces of political entrenchment and corruption. Brandeis's integration of individual liberty and majority rule embodied his credo that experience and responsibility are the best teachers. He valued the freedom of speech mainly for its function of broadening public understanding of and engagement with 'supposed grievances and proposed remedies'.[105] He considered fact- and experience-driven independent judgment about public issues to be crucial for legislators, administrators, reformers, and other democratic actors, not least ordinary persons occupying 'the most important office' in the land, the office of citizen.[106] In this and many other respects, Brandeis viewed the freedom of speech as intimately bound up with the responsibilities of citizenship.

Notes

1 See J Peter Euben, 'The Battle of Salamis and the Origins of Political Theory' in J Peter Euben (ed), *Corrupting Youth: Political Education, Democratic Culture and Political Theory* (Princeton UP 1977) 74–85.
2 See Plato 'The Apology' in RE Allen (tr), *The Dialogues of Plato*, vol 1 (Yale UP 1984) 61–104.
3 See Arlene W Saxonhouse, *Free Speech and Democracy in Ancient Athens* (CUP 2006) 20–1, 131–4.
4 See RG Mulgan, *Aristotle's Political Theory: An Introduction for Students of Political Theory* (Clarendon P 1977) 104–5.
5 See Johan Huizinga, *Erasmus and the Age of Reformation* (Princeton UP 1984) 106–7; 'Changing Assumptions in Later Renaissance Culture' in William J Bouwsma, *A Usable Past: Essays in European Cultural History* (U of California P 1990) 74–92; Alister E McGrath, *Reformation Thought: An Introduction* (3rd edn, Blackwell 2000) 35–41, 69.
6 Niccolò Machiavelli, *Discourses on Livy* (Harvey C Mansfield and Nathan Tarcov tr, U Chicago P 1966) 23–4.
7 See Diarmaid MacCulloch, *The Reformation: Europe's House Divided, 1490–1700* (Allen Lane 2003) 70–87, 584–91.
8 John Milton, *Areopagitica and other Prose Works* (first published 1927, Dover P 2016).
9 See Eric Nelson, '"True Liberty": Isocrates and Milton's *Areopagitica*' (2001) 40 *Milton Stud* 201.
10 Milton (n 8) 29.
11 Ibid.
12 Ibid 20.
13 Ibid.
14 Ibid.
15 Ibid 30.
16 Ibid 29.
17 Ibid 14.
18 Ibid 20–4.
19 Ibid 14.
20 Ibid 36.

21 Ibid.
22 See William J Bouwsma, *Venice and the Defense of Republican Liberty: Renaissance Values in the Age of the Counter Reformation* (U California P 1968); Barbara K Lewalski, *The Life of John Milton: A Critical Biography* (Blackwell 2000) 107.
23 His brother Christopher was just that, and later a distinguished judge.
24 Milton (n 8) 23.
25 Ibid 21.
26 Ibid 14.
27 See, eg, Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Cornell UP 1995); Colleen A Sheehan, *James Madison and the Spirit of Republican Self-Government* (CUP 2009); Jeremy D Bailey, *James Madison and Constitutional Imperfection* (CUP 2015); Jack N Rakove, *A Politician Thinking: The Creative Mind of James Madison* (U Oklahoma P 2017).
28 Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Random House 1991) 63.
29 James Madison, 'Report on the Alien and Sedition Acts' in James Madison, *Writings* (Library of America 1999) 651.
30 Ibid 652.
31 Ibid 655.
32 See Ralph Ketcham, *James Madison: A Biography* (UP Virginia 1990) 293–302.
33 'Property' in James Madison, *Writings* (Library of America 1999). In this important essay, Madison asserts that 'a man has a property in his opinions and the free communication of them' subject to his 'like advantage' for 'everyone else' condition. Thus, 'having one's say' might be a natural right, but not 'getting one's way' via competitive persuasion or superior communicative projection. His state of nature does not have political mobilization, printing presses, or miscreant officials. In Madison's scheme, entitlements relating to competition do not come into existence until the formation of civil society.
34 Gary Rosen, *American Compact: James Madison and the Problem of Founding* (UP Kansas 1999) 20–1.
35 4 Annals of Cong. 934 (1794).
36 *New York Times v Sullivan*, 376 US 254, 273, 275 (1964).
37 1 *Annals of Cong*. 451 (Joseph Gales, ed. 1789).
38 James Madison, 'Report on the Virginia Resolutions' (1883) 43 *Niles' Weekly Register* 18, 19.
39 John Stuart Mill, *Utilitarianism and On Liberty* (Mary Warnock ed, 2nd ed, Blackwell 2003) 88.
40 Ibid 122–3.
41 Ibid 102.
42 Ibid.
43 Ibid 114.
44 Ibid 116.
45 Ibid 118.
46 Ibid 120.
47 Ibid 121–4.
48 Ibid 109.
49 Ibid 94.
50 Ibid 96.
51 Ibid 97.
52 Ibid 131.
53 Ibid.
54 Ibid 95.
55 See Dale E Miller, *J. S. Mill: Moral, Social and Political Thought* (Polity 2010) 71–8.
56 The classic account of Mill's rule-utilitarianism is JO Urmson, 'The Interpretation of the Moral Philosophy of J.S. Mill' (1953) 3 *Phil Q* 33.
57 It is unclear whether Mill should be considered an act-utilitarian or a rule-utilitarian. See Stephen Darwall, *Philosophical Ethics* (Westview P 1998) 127–38; Henry R West, *Mill's Utilitarianism: A Reader's Guide* (Continuum 2017) 10–11, 63–5. I believe that Mill employs both forms of utilitarianism in *On Liberty*.
58 See, eg, George Kateb, 'A Reading of *On Liberty*' in David Bromwich and George Kateb (eds), *On Liberty: John Stuart Mill* (Yale UP 2003) 28, 39, 46, 47, 49–53; Fred R Berger, *Happiness, Justice & Freedom: The Moral and Political Philosophy of John Stuart Mill* (U California P 1984) 232–53; CL Ten, *Mill On Liberty* (OUP 1980) 76–78, 83–5; cf Alan Ryan, *J.S. Mill* (Routledge 1974) 133.
59 'John Stuart Mill and the Ends of Life' in Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 173, 201, 205.
60 *Masses Publishing Company v Patten*, 244 F 535 (1917).
61 Ibid 540.
62 Ibid.

63 Ibid 539.
64 Ibid 540.
65 See *United States v Nearing* 252 F 223 (1918); Gerald Gunther, 'Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History' (1975) 27 *Stan L Rev* 719.
66 Letter from Learned Hand to Zechariah Chafee, Jr (2 January 1921) in Gunther (n 65) 769, 770.
67 Ibid.
68 Letter from Learned Hand to Zechariah Chafee, Jr (8 January 1920) in Gunther (n 65) 764, 765.
69 Ibid.
70 *Masses* (n 60) 540.
71 Letter from Learned Hand to Eliot Richardson (29 January 1952) in Constance Jordan (ed), *Reason and Imagination: The Selected Correspondence of Learned Hand 1897–1961* (OUP 2013) 311.
72 See 'Letter from Birmingham Jail' in Martin Luther King, Jr, *Why We Can't Wait* (New American Library 1964) 85, 95.
73 Oliver Wendell Holmes, 'Natural Law' (1918) 32 *Harv L Rev* 40, 40.
74 Ibid 42.
75 Ibid.
76 See, eg, Louis Menand, *The Metaphysical Club* (Farrar, Straus and Giroux 2001) 65–9.
77 See Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (Harper Collins 1991) 132–3.
78 See George A Bruce, *The Twentieth Regiment of Massachusetts Volunteer Infantry 1861–1865* (Houghton, Mifflin 1906) 292–8.
79 See, eg, *McAuliffe v Mayor of New Bedford*, 29 NE 517 (Mass 1892); *Commonwealth v Davis*, 39 NE 113 (Mass 1895); *Patterson v Colorado* 205 US 454 (1907); *Fox v Washington*, 236 US 273 (1915).
80 See *Schenck v United States*, 249 US 47 (1919); *Frohwerk v United States*, 249 US 204 (1919); *Debs v United States*, 249 US 211 (1919).
81 See *Abrams v United States*, 250 US 616, 629 (1919). For a riveting account of Holmes's change of mind, see Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind and Changed the History of Speech in America* (Henry Holt 2013).
82 See Sheldon M Novick, 'The Unrevised Holmes and Freedom of Expression' [1991] *Sup Ct Rev* 303, 343.
83 *Abrams* (n 81) 630.
84 Oliver Wendell Holmes, Jr, *The Common Law* (Little, Brown 1881) 1.
85 *Abrams* (n 81).
86 Ibid.
87 Ibid.
88 *United States v Schwimmer*, 279 US 644, 653 (1929) (Holmes J, dissenting).
89 *Abrams* (n 81).
90 See Edward H Madden, *Chauncey Wright and the Foundations of Pragmatism* (U Washington P 1963) 28; Menand (n 76) 209–10, 216–17; Morton White, *Science and Sentiment in America: Philosophical Thought from Jonathon Edwards to John Dewey* (OUP 1972) 124–5.
91 Letter from Oliver Wendell Holmes, Jr to Harold J Laski (12 May 1919).
92 *Abrams* (n 81) 630 (Holmes J, dissenting).
93 Holmes (n 73) 40.
94 *Abrams* (n 81) 630 (Holmes J, dissenting).
95 *Whitney v California*, 274 US 357 (1927).
96 Ibid 375 (Brandeis J, concurring).
97 See Philippa Strum, *Louis D. Brandeis: Justice for the People* (Harvard UP 1984) 237–8.
98 Every law clerk and extended relative of Brandeis was urged by him to read Alfred Zimmern's book, *The Greek Commonwealth*, a celebration of fifth-century Athens, the central chapter of which is about the Funeral Oration: ibid, 242; see Alfred E Zimmern, *The Greek Commonwealth: Politics and Economics in Fifth-Century Athens* (5th ed, OUP 1931).
99 *Whitney* (n 95) 375.
100 Ibid.
101 Ibid 376.
102 Ibid 377.
103 Ibid.
104 Ibid.
105 *Whitney* (n 95) 375 (Brandeis J, concurring).
106 See Strum (n 98) 66.